FILED
NOV 22 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~485~~ //

UNITED STATES GYPSUM COMPANY,

Appellant,

—against—

UNITED STATES OF AMERICA; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM MADE BY APPELLEE NATIONAL GYPSUM COMPANY, PETITIONER IN THE COURT BELOW

ELMER FINCK
804 Liberty Bank Building
Buffalo 2, New York

SAMUEL I. ROSENMAN
SEYMOUR D. LEWIS
MALCOLM A. HOFFMANN
575 Madison Avenue
New York 22, New York

SEYMOUR KRIEGER
777 Fourteenth Street, N.W.
Washington 5, D. C.

Attorneys for National Gypsum Company

INDEX

PAGE

Statement 1

Argument:

1. The injunction against USG's prosecution of the Iowa suit was necessary to protect the integrity of the District Court's decree, and invoked a well-established judicial remedy which fell within the District Court's discretionary powers and ought not be reviewed 8

2. The questions presented in appellant's jurisdictional statement are so unsubstantial as not to warrant further consideration by this Court 16

TABLE OF AUTHORITIES:

Cases:

Apex Electrical Mfg. Co. v. *Altorfer Bros. Co.*, 130 F. Supp. 152 (S. D. Ill. 1955) 10

Associated Press v. *United States*, 326 U. S. 1 (1945) ..11, 27

B. B. Chemical Co. v. *Ellis*, 314 U. S. 495 (1942) 22, 26

Bellavance v. *Plastic-Craft Novelty Co.*, 30 F. Supp. 37 (D. Mass. 1939) 19

Besser Mfg. Co. v. *United States*, 343 U. S. 444 (1952) 12, 13, 27

Campbell v. *Mueller*, 159 F. 2d 803 (6th Cir. 1947).... 14

Carbice Corp. v. *American Patent Development Corp.*, 283 U. S. 27 (1931) 21

PAGE

Chrysler Corp. v. *United States*, 316 U. S. 556 (1942) 11, 13, 15, 27

Crosley Corp. v. *Hazeltine Corp.*, 122 F. 2d 925 (3d Cir. 1941), *cert. denied*, 315 U. S. 813 (1942) 9

Eclipse Bicycle Co. v. *Farrow*, 199 U. S. 581 (1905) 21

Edward Katzinger Co. v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947) 24, 25

Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 .. 24

Faulkner v. *Gibbs*, 199 F. 2d 635 (9th Cir. 1952) 21

Gayler v. *Wilder*, 51 U. S. 476 (1850) 19

Georgia Power Co., In re, 89 F. 2d 218 (5th Cir. 1937), *cert. denied*, 302 U. S. 692 (1937) 9

Hartford-Empire Co. v. *United States*, 323 U. S. 386 (1947) 7, 9, 16, 17, 18, 23

International Salt Co. v. *United States*, 332 U. S. 392 (1947) 12, 27

Kerotest Mfg. Co. v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952) 9, 15

Kobe, Inc. v. *Dempsey Pump Co.*, 97 F. Supp. 342 (N. D., Okla. 1951), *aff'd*, 198 F. 2d 416 (10th Cir. 1952), *cert. denied*, 344 U. S. 837 (1952) 10

Layne & Bowler Corp. v. *Western Well Works, Inc.*, 261 U. S. 387 (1923) 15

Lincoln Engineering Co. v. *Stewart-Warner Corp.*, 91 F. 2d 757 (7th Cir. 1937), *rvsd. on other gds.* 303 U. S. 545 (1938) 21

MacGregor v. *Westinghouse Elec. & Mfg. Co.*, 329 U. S. 402 (1947) 24, 25

PAGE

McCullough v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U. S. 813 (1948) 14
Mercoid Corp. v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) 22
Morton Salt Co. v. *Suppinger Co.*, 314 U. S. 488 (1942) 14
Murdock v. *Memphis*, 20 Wall. (87 U. S.) 590 (1875) 15

National Lockwasher Co. v. *George K. Garrett Co.*, 137 F. 2d 255 (3d Cir. 1943) 14

Paramount Publix Corp., In re, 8 F. Supp. 644 (S. D. N. Y. 1934) 19
Park-In Theatres Inc. v. *Paramount-Richards Theatres Inc.*, 81 F. Supp. 466 (D. Del. 1948), *aff'd*, 185 F. 2d 407 (3d Cir. 1950), *cert. denied*, 341 U. S. 950 (1951) 26

Ryan Distributing Corp. v. *Coley*, 51 F. Supp. 377 (E. D. Pa. 1943), *aff'd* 147 F. 2d 138 (3d Cir. 1945), *cert. denied*, 325 U. S. 859 (1945) 19

Saw-Lowell Shops v. *Reynolds*, 141 F. 2d 587 (4th Cir. 1944) 21
Sbicca-Del Mac, Inc. v. *Milius Shoe Co.*, 145 F. 2d 389 (8th Cir. 1944) 21
Schillinger v. *United States*, 155 U. S. 163 (1894) 19
Stainback v. *Mo Hock Ke Lok Po Corp.*, 336 U. S. 368 (1949) 15
Steelman v. *All Continent Corp.*, 301 U. S. 278 (1937) 9

United States v. *Crescent Amusement Co.*, 323 U. S. 173 (1944) 11, 12, 27
United States v. *Hartford-Empire Co.*, 46 F. Supp. 541 (D. D. C. 1942) 17
United States v. *National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y. 1945) 9

PAGE

United States v. *National Lead Co.*, 332 U. S. 319 (1947) 9, 11, 12, 17, 27
United States v. *Rimer*, 220 U. S. 547 (1911) 15
United States v. *Swift & Co.*, 386 U. S. 106 (1932) 11, 13
United States v. *U. S. Gypsum Co.*, 333 U. S. 364 (1948) 3, 22, 23
United States v. *U. S. Gypsum Co.*, 339 U. S. 959 (1950) 3, 23, 25
United States v. *U. S. Gypsum Co.*, 339 U. S. 960 (1950) 3, 23, 25
United States v. *U. S. Gypsum Co.*, 340 U. S. 76 (1950) 3, 4, 8, 12, 14, 15, 25-26, 27
United States v. *Vehicular Parking Ltd.*, 56 F. Supp. 297 (D. Del. 1944); 61 F. Supp. 656 (D. Del. 1945) 10, 26

Westinghouse Electric Corp. v. *Bulldog Electric Products Co.*, 179 F. 2d 139 (4th Cir. 1950) 14
Wilkerson v. *McCarthy*, 336 U. S. 53 (1949) 15

Federal Statutes:

Expediting Act

Sec. 1, 15 U. S. C. §28 1
Sec. 2, 15 U. S. C. §29 1

Sherman Act:

Section 1 3
Section 2 3
Section 3 3

Title 28, U. S. C.

§1253 1
§2101 (b) 1

PAGE

Title 35, U. S. C.

§271 (d) 16, 20, 21

Miscellaneous:

Federal Rules of Civil Procedure
Rule 8 ..... 16, 18, 19

Rules of the Supreme Court, Rule 16 1

Thoreau, Henry David—*Journal* (November, 1850) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 485

UNITED STATES GYPSUM COMPANY,

Appellant,

—against—

UNITED STATES OF AMERICA; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY, *et al.*,

Appellees.

MOTION TO AFFIRM

Appellee, National Gypsum Company, a petitioner below, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

Statement

This is a direct appeal taken under 28 U. S. C., Sections 1253 and 2101(b),[1] from the decree entered on December 9, 1954 by a District Court of three judges, specially constituted pursuant to Section 1 of the Expediting Act, 15 U. S. C. §28. In its decree of December 9, 1954 the District Court modified its final decree of May 15, 1951 acting on five petitions including that of National Gypsum Company, a co-defendant with United States Gypsum Company (here-

1 Appellee believes that these statutes are not properly invoked and that the appeal should be founded on Section 2 of the Expediting Act, 15 U. S. C. § 29.

inafter referred to as "USG" or "appellant") and others in this Government antitrust suit.[2]

In its decree of December 9, 1954 the Court, by Judges Kimbrough Stone and Eugene Worley, after determining that it had jurisdiction of the subject matter and of the parties,[3] modified the final decree of May 15, 1951 by adding to Article V thereof[4] a paragraph reading as follows:

> "Defendant United States Gypsum Company is hereby ordered and directed to discontinue and to dismiss with prejudice to United States Gypsum Company, its pending actions as follows: against National Gypsum Company, in the United States District Court for the Northern District of Iowa; against Certain-Teed Products Corporation, in the same District Court; against Newark Plaster Company, in the United States District Court for the District of New Jersey; and against Ebsary Gypsum Company, Inc., in the United States District Court for the Southern District of New York."

---

2 Other defendants in the Government action, described by the appellant as the "corporate appellees," Certain-teed Products Corporation, Ebsary Gypsum Company and Newark Plaster Company filed similar petitions for orders, modifications or directions for enforcement, construction or carrying out of the final decree of May 15, 1951, as did the plaintiff, the United States of America.

3 The Court issued an opinion on July 6, 1954 from which Judge William P. Cole, Jr. dissented primarily on the ground that "the United States can be the sole spokesman for the public interest." Appendix to Appellant's Jurisdictional Statement, pp. 13-57, 58, 59. The Jurisdictional Statement is hereinafter designated as "J. S.", the Appendix to the Jurisdictional Statement as "J. S. A."

4 Article V enjoined defendants from (a) fixing prices for gypsum products by patent license agreements or other action, (b) agreeing upon a basis for selection or classification of purchasers of gypsum products, (c) refraining to sell gypsum prod-

The proceedings which resulted in the final decree of May 15, 1951 were instituted by the United States in 1940 and have several times been before this Court, 333 U. S. 364 (First Decision, March 8, 1948), 333 U. S. 869 (rehearing den., April 5, 1948), 339 U. S. 959 (USG's appeal from District Court's decree of November 7, 1949, denied, May 29, 1950), 339 U. S. 960 (on Government's appeal to enlarge relief, Second Decision, probable jurisdiction noted, and injunction granted, May 29, 1950), 340 U. S. 76 (Third Decision, November 27, 1950). They resulted in findings that USG, patent licensor, and five other corporations, including National Gypsum Company, licensees, and six individuals, conspired to fix prices on patented gypsum board and unpatented gypsum products in violation of Sections 1, 2 and 3 of the Sherman Act, this Court noting that USG via license agreements maintained rigid control over the price and terms of sale of virtually all gypsum board (333 U. S. at 371) and controlled the sale of unpatented gypsum board and plaster (333 U. S. at 397) and acted in concert to eliminate an important class of jobbers (333 U. S. at 398). Pursuant to the mandate of this Court the District Court for the District of Columbia entered its final decree of May 15, 1951 where, *inter alia*, it was adjudged that each of USG's patent license agreements with its co-defendants is unlawful under the antitrust laws of the United States and illegal, null and void (Article IV, J. S. A. 1, 6).

Immediately following this Court's first decision of March 8, 1948 voiding the patent license agreements (333 U. S. 364), National Gypsum discontinued the payment of

---

ucts to any purchasers or class of purchasers, (d) agreeing upon or quoting gypsum products pursuant to delivered price plans resulting in identical prices, and (e) policing, investigating, checking or inquiring into prices, quantities, terms or conditions of any offer to sell or sale of gypsum products (J. S. A. 7).

royalties to USG. It withheld payment of royalties until after the final decree of May 15, 1951 when, for the first time, National Gypsum Company was able to obtain a new patent license agreement free of illegal restraints (J. S. A. 65, 71).[5]

The third decision of this Court on November 27, 1950 (340 U. S. 76) which occasioned the District Court's final decree of May 15, 1951, resulted from the Government's appeal from the narrow scope of the first District Court decree of November 7, 1949. In that decision this Court admonished the District Court that it should "cure the ill effects of the illegal conduct", 340 U. S. at 88, and that, "the conspirators should, so far as practicable, be denied future benefits from their forbidden conduct", 340 U. S. at 89. Consequently, the decree of May 15, 1951 expanded the relief earlier granted. It provided for compulsory licensing by USG at reasonable non-discriminatory royalty rates (Article VI), contained the injunction described in note 4 above (Article V), and enumerated certain patent licensing agreements including the agreement between USG and National Gypsum Company as "unlawful under the anti-trust laws . . . illegal, null and void." (Article IV, J. S. A. 6.)

Notwithstanding these decretal provisions, on January 28, 1953 USG commenced an action in the United States District Court for the Northern District of Iowa against National Gypsum Company claiming royalties unpaid under the voided license agreement during the period from the Supreme Court's first decision of March 8, 1948 to the date of the final decree, in the amount of $1,600,000.[6]

---

5 Supporting references here are to the Findings of Fact in the present proceedings entered by the Court on December 9, 1954 (J. S. A. 65-75).

6 In January, February or March, 1953 USG filed separate similar actions against three of the other defendant-licensees who

The suit was in five counts. Counts I and II expressly pleaded National Gypsum Company's liability for royalties in the amount of $1,600,000 on the license agreement which the decree had made a nullity. Count III also alleged National Gypsum's liability for $1,600,000 at the royalty rate fixed by the illegal agreement and is described in the Findings of Fact of the District Court as a "common law action of *indebitatus assumpsit* based on a pleaded express contract." (J. S. A. 73.) That contract and the relief sought are so stated as to bring about the identical recovery that would have been realized had the count been for recovery upon the royalties provided for in the illegal agreement (*Id.*). Count IV, also in the amount of $1,600,000 representing the same royalty, was found by the District Court to be a *quantum meruit* count covering the use of patents (*Id.*). Count V charged infringement by National Gypsum Company of a patent under which licensing rights had been granted to it by the voided agreement and damages were fixed at $1,600,000, again by reference to the royalty rate found in the voided agreement (J. S. A. 53).

This proceeding was stayed by the Iowa Court upon the application of National Gypsum Company (J. S. A. 18) which thereafter petitioned the District Court for the District of Columbia to enjoin USG from continuing the Iowa action and from asserting any claim against National for payment for use of USG's misused patents for any period of time prior to May 15, 1951, the date of the final decree in the antitrust proceeding. Other licensees filed similar

---

had withheld payment of royalties: against Certain-teed Products in the Northern District of Iowa; against Newark Plaster Co. in the District of New Jersey; against the Ebsary Gypsum Co. in the Southern District of New York. These suits were all based on the same theory of cause of action and were all in substantially similar form, although the time period of the claims for non-payment of royalties in the Newark and Ebsary cases extended until the dates of filing of the complaints (J. S. A. 17).

petitions (See note 2, *supra*), and the United States petitioned the Court to enjoin USG from asserting any claim or suit "in whole or in part on any of the license agreements adjudged illegal, null and void by the final decree of this Court entered on May 15, 1951 or on any provision thereof." (J. S. A. 17-18.)[7]

On these facts the District Court for the District of Columbia concluded[8] that USG should be enjoined from further prosecuting the first two counts of its suits since in asserting them the defendant "clearly violated the express provisions of Article IV" (J. S. A. 77)—the provision of the final decree which declared the patent license agreements to be null and void. The District Court further concluded that since Article IV of the final decree did not expressly or impliedly cover the counts sounding in *indebitatus assumpsit*, infringement, or *quantum meruit*, it would modify the decree in order to enjoin prosecution of such counts (J. S. A. 77-78). The Court pointed out that "the purpose and permissible function of an order for modification of an antitrust decree is to cover something within the broad purposes of the decree but which, for some proper reason, was not included in the existing decree. Almost always such modifications are concerned with remedies. Usually they concern situations which were either overlooked at the time the decree was entered or which have arisen or developed after the decree." (*Id.*) It noticed that it had expressly reserved jurisdiction in Article X of the final decree "to take further action, if experience thereafter should make such necessary or advisable, fully

---

7 On September 9, 1953 USG filed its answer to all the petitions (J. S. 2).

8 On December 9, 1954 the District Court entered its Conclusions of Law to which reference here is made (J. S. A. 75-79).

to effectuate the purposes of destroying the monopoly and conspiracy and denying the fruits thereof." (*Id.*) The Court also concluded that in addition to its expressly reserved power in the final decree, as a Court of Equity it had inherent power to modify its decrees "so as to make them fully effective, provided, however, that the decree may not be enlarged beyond its intended proper scope." (J. S. A. 78.)

The District Court further concluded that USG had not at any time prior to May 15, 1951 purged itself of its patent misuse and consequently "should be enjoined from further prosecution of all Counts." (*Id.*) It stated that to "allow prosecution of these suits would weaken the effectiveness of the Final Decree" and "*because of the practical and legal situation in this case,* and also the teaching in the *Hartford-Empire* case" enjoined their further prosecution by USG (Emphasis supplied; J. S. A. 78-79).

On June 30, 1955 the District Court denied a motion for a new trial made by USG (J. S. A. 91, 92).

As noted above (pp. 3-4, *supra*), National Gypsum Company accepted a new license agreement from USG immediately after the filing of the decree of May 15, 1951 and the Iowa action directed to National Gypsum Company's non-payment of royalties is for a period ending May 15, 1951. Consequently, issues relating to purge or dissipation of the illegal restraints subsequent to that time are not pertinent to this motion which can only properly relate to that part of the Court's order which enjoined USG's action against National Gypsum Company in the Iowa District Court. Although we believe that the District Court's decree of December 9, 1954 is proper in its entirety, the argument which follows is addressed only to the issues raised by National Gypsum Company's petition.

ARGUMENT

1.

The injunction against USG's prosecution of the Iowa suit was necessary to protect the integrity of the District Court's decree, and invoked a well-established judicial remedy which fell within the District Court's discretionary powers and ought not be reviewed.

The decision of the District Court is plainly correct. That Court had been instructed by this to grant relief which will "so far as practicable cure the ill effects of the illegal conduct . . ." 340 U. S. at pp. 88-89. It was confronted with an unrepentant flouting of the decree of May 15, 1951 and a bold attempt to subvert its effectiveness. On the petitions of all the interested parties the Court took the only possible measure which might preserve the dignity and integrity of its final decree. It did so only after elaborate briefing and argument on the issues,[9] including a hearing on a motion for a new trial.[10] To protect its decree

---

9 Briefs were filed by each of the petitioners, USG and the United States, and reply briefs were filed by the petitioners. Oral arguments on January 12 and January 13, 1954 comprised 253 pages of transcript (USG Notice of Appeal, p. 10). The majority opinion of July 6, 1954 contained 38 pages and considered in detail all matters presented by the parties. In connection with the motion for a new trial made by USG briefs were filed by all parties, and a full day's oral argument was heard by the Court on April 6, 1955, filling 178 pages of transcript (USG Notice of Appeal, p. 12).

10 In denying the motion, the District Court said:

> "Although the merits of these petitions by the Government and the other petitioners were exhaustively discussed and determined, in majority and dissenting opinions, and the settlement of Findings and of the Conclusions and the form of judgment had been painstakingly considered by this Court heretofore in the light of extended invited suggestions

and implement its general purpose it employed the traditional and well established procedure of enjoining a multiplicity of actions in other Courts which would derogate from its continuing powers to supervise the operation of its own decree. *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183-184 (1952); *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 289-291 (1937); *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. 2d 925, 929-930 (3d Cir. 1941), *cert. denied*, 315 U. S. 813 (1942); *In re Georgia Power Co.*, 89 F. 2d 218, 221 (5th Cir. 1937), *cert. denied*, 302 U. S. 692 (1937).

The District Court's injunction against continuance of the Iowa action applied a judicial remedy now well established in patent antitrust cases. Landmark cases in which the patentee has been enjoined from enforcing patent rights misused under the antitrust laws are *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 418-419 (1947) and *United States* v. *National Lead Co.*, 63 F. Supp. 513, 534 (S. D. N. Y. 1945), *aff'd*, 332 U. S. 319 (1947). In both the *Hartford* and *National Lead* cases defendant-patentees were enjoined from bringing any infringement suits for royalties under their misused patents for any period of time prior to the entry of the decree. This Court has noted that the violations of law in the *National Lead* case "were as offensive to the prohibitions of the Sherman Act as those proven in the present case", 340 U. S. at 93-94.

Recent lower Court decisions have applied the teaching of these cases so that it is now often provided in litigated

---

from counsel, we have not deemed this present motion as merely a necessary formal step in the progress to a final determination by the Supreme Court. Not only have we listened to the excellent oral arguments on this motion but we have carefully read and studied the complete transcript of that hearing as well as all of the matters brought to our attention therein." (J. S. A. 92-93).

antitrust decrees that patentees misusing their patents under the antitrust laws are enjoined from asserting infringement or other rights under their patents until the effects of their violations can be shown to have been fully dissipated. *Kobe, Inc.* v. *Dempsey Pump Co.*, 97 F. Supp. 342 (N. D. Okla. 1951), *aff'd* 198 F. 2d 416 (10th Cir. 1952), *cert. denied* 344 U. S. 837 (1952); *Apex Electrical Mfg. Co.* v. *Altorfer Bros. Co.* (130 F. Supp. 152 (S. D. Ill. 1955)); *United States* v. *Vehicular Parking Ltd.*, 56 F. Supp. 297 (D. Del. 1944), 61 F. Supp. 656 (D. Del. 1945).[11]

The action of the District Court fell well within the scope of its discretionary powers to implement its decree and ought not to be reviewed here. Litigation like everything else must have an end, and this case has already been before the Court on three occasions.[12] The District Court

---

11 The same relief is almost uniformly included in consent decrees settling patent misuse cases. During the period from 1946 to December 1954, it is found in 40 of 58 such cases. CCH Trade Cases (1946-1947) Par. 57,492, p. 58,295; Par. 57,444, p. 58,058; Par. 57,603, p. 58,656; Par. 57,579, p. 58,587; Par. 57,645, p. 58,783; Par. 57,458, p. 58,122; Par. 57,542, p. 58,452; Par. 57,456, p. 58,115; Par. 57,621, p. 58,710; Par. 57,433, p. 58,036; CCH Trade Cases (1948-1949) Par. 62,230, p. 62,341; Par. 62,284, p. 62,649; Par. 62,349, p. 62,905; Par. 62,223, p. 62,272; Par. 62,255, p. 62,519; Par. 62,338, p. 62,879; Par. 62,268, p. 62,606; Par. 62,233, pp. 62,358, 62,363; Par. 62,518, p. 63,534; Par. 62,323, p. 62,809; Par. 62,442, p. 63,270; Par. 62,334, p. 62,860; Par. 62,236, p. 62,375; Par. 62,330, p. 62,844; Par. 62,356, p. 62,933; CCH Trade Cases (1950-1951) Par. 62,533, p. 63,575; Par. 62,586, p. 63,727; Par. 62,867, p. 64,570; Par. 62,914, p. 64,783; CCH Trade Cases (1952) Par. 67,248, p. 67,385; Par. 67,233, p. 67,343; Par. 67,403, p. 68,060; CCH Trade Cases (1952-1953) Par. 67,583, p. 68,769; Par. 67,501, p. 68,465; Par. 67,595, p. 68,859; CCH Trade Cases (1954) Par. 67,714, p. 69,299; Par. 67,733, p. 69,361; Par. 67,771, p. 69,468; Par. 67,828, p. 69,681; Par. 67,829, p. 69,691.

12 USG has included in its record on appeal almost the entire record of all the prior proceedings in this matter as if in an attempt

has a broad power to modify and reshape its injunction. In *Chrysler Corp.* v. *United States,* 316 U. S. 556 (1942) Mr. Justice Byrnes stated at page 562:

> "It is clear that under paragraph 14 of the original decree the District Court had jurisdiction to modify it. The question is whether the change in date in paragraph 12 amounted to an abuse of this power to modify. We think that the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree. *United States* v. *Swift & Co.,* 386 U. S. 106."

In *United States* v. *Crescent Amusement Co.,* 323 U. S. 173 (1944) Mr. Justice Douglas said at page 185:

> "where the findings of violations are sustained, we will not direct a recasting of the decree except on a showing of abuse of discretion."

In *Associated Press* v. *United States,* 326 U. S. 1 (1945) Mr. Justice Black, writing for the Court, at page 22, said:

> "The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court."

In *United States* v. *National Lead Co.,* 332 U. S. 319 (1947) Mr. Justice Burton said at pages 334-335:

> "In our opinion, the provisions of this decree, to a large extent, are matters lying within the discretion of the District Court as a court of equity whose duty it was

---

to reargue once again issues long since put to rest. (Notice of Appeal, pp. 2-9.)

to make the remedy as effective as possible. . . . We believe that the District Court has not exceeded its discretion in the provisions of this decree. . . ."

In *International Salt Co.* v. *United States,* 332 U. S. 392 (1947) Mr. Justice Jackson said at pages 400-401:

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."

The most recent pronouncement of this Court on the scope of review of antitrust decrees is found in *Besser Mfg. Co.* v. *United States,* 343 U. S. 444 (1952). In that case Mr. Justice Jackson writing for the Court said at page 449:

"In framing relief in anti-trust cases, a range of discretion rests with the trial judge. *United States* v. *National Lead Co., supra,* at 338; *International Salt Co.* v. *United States, supra,* at 400-401, 405; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185. We can see no abuse of discretion here."

It is noteworthy that the language of this Court in the *Gypsum* case in 1950, 340 U. S. 76, at p. 89, upon which USG relies (J. S. 25), "Notwithstanding our adherence to trial court responsibility in the molding of a decree as the wisest practice and the most productive of good results, we have never treated that power as one of discretion, subject only to reversal for gross abuse" and which can be interpreted to delimit the trial court's discretionary power in antitrust decrees[13] is not referred to in the sub-

13 In *Gypsum* this Court, however, also said:

"The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court.

sequent *Besser* decision which reasserts the predominant thinking of this Court. Certainly this Court has left open sufficient area for the operation of a trial court's discretion to encompass what was done here. There is no need on the modification sought to be reviewed to probe for its perimeter and to define the maximum of the trial court's powers. We shall show below that the modification met this Court's test of proper exercise of discretion which is "whether the change served to effectuate . . . the basic purpose of the original . . . decree," *Chrysler Corp.* v. *United States,* 316 U. S. 556, 562 (1942); *United States* v. *Swift & Co.,* 286 U. S. 106 (1932).

In *United States* v. *Swift & Co.,* 286 U. S. 106, 114 (1932), this Court made it clear that the power to modify an anti-trust decree inheres in a court of equity, saying:

> "Power to modify the decree was reserved by its very terms . . . If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

In the present proceedings, as in the *Swift* case, the District Court, in Article X of its Final Decree, explicitly reserved jurisdiction to deal with matters such as those raised by National's petition.

This power to modify a decree is not, to be sure, unlimited, as *Chrysler Corp.* v. *United States,* page 11, *supra,* shows. The lower Court modified the final decree of May 15, 1951 only after extensive argument and briefing, Findings of Fact (J. S. A. 63), Conclusions of Law (J. S. A. 75) and an Opinion (J. S. A. 13) in which the Court de-

---

Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court. This has been repeatedly recognized by us." (340 U. S. at p. 89.)

termined that to effectuate fully its basic purpose the original decree must be modified (J. S. A. 94). The Court's exercise of its power to modify was clearly designed to effectuate the basic purpose of the original decree and consequently ought not to be reviewed. This Court had made it clear that the purpose of the decree which it directed the District Court to enter was "so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance . . . The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct" 340 U. S. at pp. 88-89. Modification of the decree specifically enjoining USG from enforcing its misused patents against National Gypsum Company for the period prior to the entry of the final decree did no more than to apply and implement that purpose. See, e.g., *Morton Salt Co.* v. *Suppinger Co.*, 314 U. S. 488, 491 (1942); *Westinghouse Electric Corp.* v. *Bulldog Electric Products Co.*, 179 F. 2d 139 (4th Cir. 1950); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), *cert. denied*, 335 U. S. 813 (1948); *Campbell* v. *Mueller*, 159 F. 2d 803 (6th Cir. 1947); *National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255 (3d Cir. 1943).

The modification merely made explicit that which necessarily must have been implied if Article IV of the decree declaring the patent license agreements nullities were to have purpose or effect, and it aborted USG's attempt to subvert the decree, both directly through the counts on the illegal agreements, and, elsewhere[14] as the District Court found, through "a left-handed, indirect method." (Conclusions of Law, 12/9/54, No. 14, J. S. A. 78.)

Even greater reason attaches for honoring the discretion of the trial court in modification of a litigated decree than

---

14 On the *indebitatus assumpsit* count.

in the "molding" of the initial decree, which this Court has called "this most significant phase of the case", *United States* v. *U. S. Gypsum Co.*, 340 U. S. 78, 89. Inappropriate provisions in the initial decree may defeat the great objective of the antitrust litigation "to restore future freedom of trade" (*Id.*). A modification of the decree designed to "effectuate" rather than "to thwart the basic purpose" of the original decree (See *Chrysler Corp.* v. *United States*, 316 U. S. 556, 562) is an action which cannot defeat the public interest in the litigation, and as to its need the trial court with intimate knowledge of the record will have particular competence. The lower Court does no more than mold its decree to accommodate a change in circumstances.

As this Court recently said, "necessarily an ample degree of discretion appropriate for disciplined and experienced judges must be left to the lower Courts." *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183-184 (1952). If every review of modification of an antitrust decree designed to implement its purpose were to be heard by this Court, the sluices would be opened to a torrent of unnecessary and stultifying appellate activity. Importance of the outcome merely to the parties should not be enough to activate this Court. Cf. *Layne & Bowler Corp.* v. *Western Well Works Inc.*, 261 U. S. 387, 392-3 (1923); *United States* v. *Rimer*, 220 U. S. 547, 548 (1911); *Murdock* v. *Memphis*, 20 Wall. (87 U. S.) 590, 628-29 (1875). And *cf.* Mr. Justice Frankfurter concurring in *Stainback* v. *Mo Hock Ke Lok Po Corp.*, 336 U. S. 368, 385 (1949); *Wilkerson* v. *McCarthy*, 336 U. S. 53, 66-67 (1949).

2.

The questions presented in appellant's jurisdictional statement are so unsubstantial as not to warrant further consideration by this Court.

USG suggests that substantial questions exist because:

(1) the District Court erroneously found continued patent misuse through misapplication of the teaching of *Hartford-Empire Co., et al.* v. *United States,* 323 U. S. 386, 324 U. S. 570 (J. S. 19);

(2) the District Court found patent misuse in USG's effort to enforce the royalty provisions of the voided patent license agreements in counts of its suits against its licensees when the Court could have disregarded these deliberately and explicitly pleaded counts by application of Rule 8 of the Federal Rules of Civil Procedure (J. S. 22);

(3) the District Court's finding of continued patent misuse conflicts with Title 35, U. S. C. Sec. 271 (d) (J. S. 24); and

(4) the District Court's exercise of discretion is reviewable by this Court (J. S. 25).

(5) USG also asserts, without discussion, that the decree of the District Court is inappropriate "for disposing of the misuse and purge issues as a matter of law and without the taking of any evidence" (J. S. 25-26).

Except for the problem of District Court discretion, which is discussed at pages 8-15, *supra,* we consider, *seriatim,* these questions as raised by appellant.

(1) It has already been noted that the District Court's reliance on "the teaching in the *Hartford-Empire* case" was but an alternative base for its decision bottomed on the "practical and legal situation in the case" [15] enjoining USG's prosecution of its infringement claims. (Conclusions of Law, 12/9/54, No. 16, J. S. A. 78-79.) That decision of this Court, however, offered a solid precedent for the District Court's decree and its application to the facts at bar presents no important or substantial question. In the first *Hartford-Empire* opinion, 323 U. S. 386, this Court was faced for the first time with the problem of defining appropriate remedies for violations of the antitrust laws under an analogous factual and legal situation where there existed broad industry-wide restraints and monopolization through patent misuse. It provided for compulsory licensing at reasonable royalties for the post-decree period and an injunction against the assertion of infringement claims for the pre-decree period (323 U. S. at 419). The same remedy was adopted on similar facts in the *National Lead* case, 332 U. S. 319 (1947), *affirming* 63 F. Supp. 513 (S. D. N. Y. 1945). The basic teaching of *Hartford-Empire*, and obviously that on which the lower Court relied in the present proceeding, was that pre-decree infringement claims could be forbidden as well as compulsory licensing granted where patents have been misused under the antitrust law. Some of Hartford's licensees, however, paid their royalties during the period between the initial and final decrees to Hartford's receiver, who had been appointed, *inter alia*, "to prevent any further abuse of the patent privileges of Hartford", 46 F. Supp. 541, 620 (D. D. C. 1942). These licensees who

---

15 The Court in analyzing this situation looked to the unlawful use of USG patents in violating the antitrust laws which had the effect of placing the licensees in a "perilous position" (J. S. A. 47), and also considered USG's continued misuse of its patents (J. S. A. 56-57).

had paid royalties were, of course, not infringers during this period of time. Consequently, the holding of the Supreme Court as to the disposition of the funds paid into the receiver in no way constitutes a precedent for the disposition of the claims of the present proceeding and could not have furnished the "teaching" of the case referred to by the lower Court (J. S. A. 50).

The treatment of earmarked royalties in *Hartford-Empire* in no way subtracted from the precedent value of that decision as to the propriety of enjoining actions for pre-decree infringement, and USG's inaccurate description of the meaning of that case (Compare J. S. 20-21 *with* the supporting reference there given: 323 U. S. 409, 415) cannot create a substantial question.

(2) USG's second claim to a pending substantial question is based upon an asserted failure of the lower Court to apply Rule 8 of the Rules of Civil Procedure in determining the meaning of USG's pleadings in its suits against the co-defendants (J. S. 22-24).

The lower Court found that the counts on the voided license agreements violated the decree (Conclusions of Law, 12/9/54, No. 13, J. S. A. 78) and that the counts *dehors* the agreement were but an indirect way of attempting to force a recovery which it was the purpose of the final decree to prevent (Conclusions of Law, 12/9/54, No. 14, J. S. A. 78).

The propriety of modification of the decree does not stand or fall upon the District Court's interpretation of USG's pleadings. USG urges that because of Rule 8 of the Rules of Civil Procedure the District Court should have disregarded its pleading on the contracts voided by the antitrust decree. In effect USG claims that the deliberate acts of a sophisticated pleader ought to be dis-

regarded. Nothing in Rule 8 which allows alternative claims for relief gives support to this startling suggestion.

Were there substance to the contention that the pleading should be disregarded, since the "final theory of recovery is for the Court rather than the pleader" (J. S. 23) it would prove too much and could only defeat appellant's afterthought that the action sounds in theory other than contract (J. S. 24). All the counts were for sums computed on the contract base for royalties. (See pages 4-5, *supra.*) The *indebitatus assumpsit* count was found by the Court below to be "based on a pleaded express contract" (Findings of Fact, 12/9/54, No. 28, J. S. A. 73). The remedies available for patent infringement are wholly statutory[16] and have no common law basis. Consequently, *quantum meruit* and quasi-contractual actions cannot lie. *Gayler* v. *Wilder,* 51 U. S. 476, 493 (1850); *Bellavance* v. *Plastic-Craft Novelty Co.,* 30 F. Supp. 37 (D. Mass. 1939); *In re Paramount Publix Corp.,* 8 F. Supp. 644 (S. D. N. Y. 1934); see *Schillinger* v. *United States,* 155 U. S. 163 (1894). By mechanical elimination the Court below in determining the theory of the cause of action would have been left with three counts based on the contract and one for infringement. Under such circumstances it would have been an arbitrary if not a fatuous choice had the lower Court found that USG had pleaded merely an action for infringement.

(3) USG also asserts (J. S. 24-25) that the trial Court's conclusion of a continuing misuse of patents during the pre-decree period conflicts with the recent codification of

---

16 A patentee may sue for damages for infringement at law or seek an injunction, accounting and damages in equity. 35 U. S. C. Secs. 281, 283, 284; *Ryan Distributing Corp.* v. *Coley,* 51 F. Supp. 377 (E. D. Pa. 1943), *aff'd* 147 F. 2d 138 (3d Cir. 1945), *cert. denied* 325 U. S. 859 (1945).

the patent laws, Title 35, U. S. C. Sec. 271 (d). It is there provided:

> "No patent owner *otherwise entitled to relief for infringement* . . . shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . (3) sought to enforce his patent rights against infringement or contributory infringement." [17] (Emphasis added.)

The argument is that since the mere bringing of a patent infringement suit is not a misuse, *a fortiori,* a suit on a voided license agreement is not itself a misuse (J. S. 24). This extraordinary contention was advanced for the first time on USG's motion for a new trial and was disposed of by the Trial Court's memorandum opinion of June 30, 1955 (J. S. A. 93-94). The Court, speaking of the statute, said:

> "The vital words for us . . . are 'otherwise entitled.' Patents are classical instruments in conspiracies and combinations to violate the Sherman Act. Can it be that where a designated misuse of patents—here patent license agreements—has been adjudged to be violative of that Act that thereafter the patentee-licensor is absolutely protected by paragraph (d) (3) from the defense of misuse in recovering upon those adjudged unlawful agreements? Can it be possible that Congress intended, by paragraph (d), to give to a patentee a protection superior to the broad public policy of the Sherman Act?" [18]

---

17 This codification became effective January 1, 1953. Thereafter, USG sued on its illegal agreements and for infringement.

18 Inaccurately quoted by appellant at J. S. A. 94.

It answered its own questions by stating:

> "We cannot believe that paragraph (d) was intended to or can properly be construed as nullifying the power of this Court to effectuate the purposes of an anti-trust decree. In short USG is *not* 'otherwise entitled' to come within paragraph (d) (3)."

No extended discussion is needed to demonstrate that Title 35, U. S. C. Sec. 271 (d) is inapposite to the present proceeding. From the face of the statute it is plain that the statute merely lays down the principle that a patentee *otherwise entitled to relief* is not guilty of misuse by merely enforcing his patent rights against *infringement or contributory infringement*. That, of course, is not what USG did in the proceedings brought against its licensees. Its infringement claim constituted only one of five or six counts. The statute is limited solely to enforcing "rights against infringement." A suit on a license agreement is on a contract; a suit for infringement is for a tort.[19] It was the suit on the voided license agreement which the lower Court primarily relied upon as showing continued misuse and consequently USG can get no comfort from the statute. It is further apparent from the face of the statute that to have access to its provisions the patent owner must be "*otherwise entitled* to relief for infringement." As we have seen, this Court has held that the patentee is not so entitled during a period while his patents are being used as instruments for monopoly and prior to purge, and consequently

---

19 Compare *Carbice Corp.* v. *American Patent Development Corp.*, 283 U. S. 27, 33 (1931); *Faulkner* v. *Gibbs*, 199 F. 2d 635, 638 (9th Cir. 1952); *Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 91 F. 2d 757, 763 (7th Cir. 1937), revsd. on other gds., 303 U. S. 545 (1938) *with Eclipse Bicycle Co.* v. *Farrow*, 199 U. S. 581, 586-88 (1905); *Sbicca-Del Mac Inc.* v. *Milius Shoe Co.*, 145 F. 2d 389 (8th Cir. 1944); *Saw-Lowell Shops* v. *Reynolds*, 141 F. 2d 587, 596 (4th Cir. 1944).

the statute cannot protect the infringement count. *E.g., Mercoid Corp.* v. *Mid-Continent Investment Co.,* 320 U. S. 661, 664-665 (1944); *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495, 497-98 (1942).

(4, 5) We have shown at pp. 8-15, *supra,* that the District Court's modification of the May 15, 1951 decree fell well within the scope of its discretionary powers. USG urges, however, that the modification is "inappropriate" "for disposing of the misuse and purge issues as a matter of law and without the taking of any evidence." (J. S. 25-26.)

National Gypsum did not pay royalties for any part of the period from February 1, 1948 (because of this Court's decision on March 8, 1948) until May 15, 1951, the date of the final decree of the District Court (see pp. 3-4, *supra*). The District Court found that USG had not purged its misuse of patents during this period, or at any time (Findings of Fact, 12/9/54, No. 22, J. S. A. 70; Conclusions of Law, 12/9/54, Nos. 11, 12, 13, 15, J. S. A. 78). The pertinent question, therefore, on National's petition is whether the Trial Court as a matter of law could have decided the question of purge for this period ending May 15, 1951 without the taking of evidence. The lower Court had before it a claim of purge taking place during a twenty-five month span while the proceedings were mostly either before the Supreme Court on appeal or the lower Court for reconsideration.[20]

---

20 This Court rendered its decision on March 8, 1948 (333 U. S. 364) and denied a rehearing on April 5, 1948 (333 U. S. 869). Thereafter, beginning on June 8, 1948, the case was again before the District Court where numerous briefs and memoranda were filed by all parties, in connection with the United States' motion for summary judgment, the offers of proof, suggested findings of fact and the form and contents of the decree to be entered. After a hearing by the District Court on July 14, 1949, further memoranda were submitted up to August 12, 1949 (J. S. A. 65-66). The

The District Court reached the conclusion that the effects of the patent misuse remained undissipated upon consideration of USG's five factual claims of purge, finding that "neither taken separately nor cumulatively do any or all of these matters amount to evidence of purge by USG of its misuse of its patents" (Findings of Fact, 12/9/54, No. 22, J. S. A. 70-72). The course of conduct of USG, "as clearly shown by the proceedings of record in the antitrust case and in these suits by USG" (Conclusions of Law, 12/9/54, Nos. 11, 13, J. S. A. 78) constituted the "practical and legal situation in this case" which required modification of the decree, and it was only alternatively because of the "teaching in the *Hartford-Empire* case" that the District Court ordered modification of the final decree (Conclusions of Law, 12/9/54, No. 16, J. S. A. 78-79).

USG advances no cogent reason why this Court should review the District Court's finding that its factual claims cannot amount to a purge in law. A glance at this Court's decision at 333 U. S. 364 shows that USG's wrong was not limited to illegal price-fixing, but as the Court below found, that restraint was "inseparably joined with the other provisions found violative of the Act." Consequently, USG's first claimed act of purge—a tentative notice sent to its licensees while litigation was pending that USG would suspend price fixing "until we decide again to exercise our right to do so" (Findings of Fact No. 22, J. S. A. 70)—cannot amount to more than a grudging attempt to

---

Court entered its decree on November 17, 1949 (J. S. A. 68). Both the United States and USG appealed, and on May 29, 1950, this Court dismissed USG's appeal (339 U. S. 959, 960) and noted probable jurisdiction in the appeal of the United States (339 U. S. 960). The case was argued on October 19, 1950 and decided on November 27, 1950 (340 U. S. 76). Once again, the case was before the lower Court from January 4, 1951 when the mandate was filed until May 15, 1951 when the final decree was entered (J. S. A. 69).

cure but part of its illegal activity (J. S. A. 54).[21] Secondly, a claim of purge was bottomed on USG's asserted acquiescence in its licensees' cessation of royalty payments. The suits to recover royalties under the agreement, and this appeal, show that the acquiescence, whatever operative legal meaning it might have had, never took place,[22] or, having taken place, was abandoned in a deliberate effort to flout the decree (J. S. A. 54-55). A third claim was based on USG's proffer of license agreements in 1949 in new form. Since these agreements were not intended to become effective until entry of the District Court's decree, and differed from what this Court approved (340 U. S. 76), the proffer could have no effect until May 15, 1951 and cannot here be material (Findings of Fact, 12/9/54, No. 22, J. S. A. 71). Fourthly, a claim was made that USG determined it would not appeal the District Court's decision unless the Government appealed. USG in fact appealed on very different questions from those posed by the Government, and consequently this subjective nicety can have had no objective

---

21 The District Court said of this attempt:

"The first of these five is that USG did not fix prices, under its licenses, after July 8, 1941. This is true. However, its effect is dissipated by two considerations: first, the notices that minimum prices bulletins would be suspended included the statement that such suspension would continue 'until we decide again to exercise our right to do so';[16] and, second, this price fixing provision is inseparably joined with the other provisions found violative of the Act (*Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Elec. & Mfg. Co.*, 329 U. S. 402)."

---

16 The "potential power" (*Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458) remained.

22 The District Court found that there is no basis for this claimed "acquiescence" (J. S. A. 71).

effect.[23] (*Compare* 339 U. S. 959 *with* 339 U. S. 960.) Finally, and curiously, USG relies in support of purge upon the Supreme Court's injunction of May 29, 1950 against its "enforcing in any manner whatsoever" the price provisions of the illegal license agreements which USG had tentatively abandoned with reservation of a right of reassertion (339 U. S. 960). The patent license agreements were illegal in their entirety[24] and had been stricken in their entirety before that decision of this Court, as they were again in the final decree which followed, but in defiance of these rulings USG launched the suits based on the agreements which were enjoined. The District Court found that "the USG suits now pending show conclusively . . . that even now it is striving to enforce the royalty provisions of the illegal patent license agreements." (Findings of Fact, 12/9/54, No. 22, J. S. A. 72.) Henry David Thoreau once said, "Some circumstantial evidence is very strong, as when you find a trout in the milk." [25] Certainly the Supreme Court's opinion of May 29, 1950 is the basis for a finding of violation, but only the magic of advocacy can draw from it support for a claim of purge.

On the very claims made there was, therefore, no need for the taking of testimony, since the maximum claimed, if proved, would have been insufficient in law to support the burden of proof which fell upon USG (*United States* v.

---

23 The District Court found that "neither this unacted upon decision not to appeal nor an appeal by the Government in any way affects this matter of purge." (J. S. A. 71.)

24 It was settled law in this Court before the decree that unlawful price-fixing provisions in patent license agreements are not severable from the license provisions for the payment of royalties. *Edward Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394, 401 (1947); *Mac Gregor* v. *Westinghouse Co.*, 329 U. S. 402, 407 (1947).

25 *Journal*, November 1850.

U. S. Gypsum Co., 340 U. S. 76, 85-88 (1950); *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498 (1942); See also *Park-In Theatres Inc.* v. *Paramount-Richards Theatres Inc.*, 81 F. Supp. 466, 470 (D. Del. 1948), *aff'd*, 185 F. 2d 407 (3d Cir. 1950), *cert. denied*, 341 U. S. 950 (1951); *United States* v. *Vehicular Parking, Ltd.*, 61 F. Supp. 656, 658 (D. Del. 1945); *Id.*, 56 F. Supp. 297, 298 (D. Del. 1944).

In oral argument below, and in its briefs, appellant had ample opportunity to make an offer of proof or to particularize the manner in which the taking of testimony might help its cause. It is to be supposed that if any evidence were available to appellant which might have shown purge or dissipation of the unlawful restraints, it would have come forward below with a representation that such evidence existed. The most that able counsel urged on the Court was that purge could be shown by the "five facts" of record, the significance of which has been discussed above. Although appellant made the reservation in a footnote in its brief[26] that these facts "are of course only illustrative and not the only or exclusive facts showing purge" the District Court found that "in spite of this cautionary reservation, we must conclude that USG is presenting here those matters which it regards as most potent in showing purge" (J. S. A. 54). The failure of appellant to specify as evidence of purge matters other than those of record which it asserted operated as a purge in law,[27] constituted a surrender of any serious claim to the need for the taking of evidence.

---

26 "Brief of U. S. Gypsum Company in Answer to Briefs Filed Herein by Defendant-Petitioners", filed September 8, 1953, p. 134, note 82A.

27 Counsel for appellant stated in argument before the Court, referring to circumstances appearing in the record, "if the burden is on us in this Court to show a purge, why then we have shown it." (Transcript of hearing on January 13, 1954, p. 213.)

Nowhere in its Jurisdictional Statement does USG attempt to make a showing that its patent misuse has been terminated nor in the Court below did USG attempt to meet its burden to introduce facts which would operate in law as a purge. Consequently, the District Court, using its "more flexible procedure" for the settlement of a decree (340 U. S. 76) acted well within the scope of its discretion in implementing the purpose of the Final Decree of May 15, 1951 by barring USG from recovery on its misused patents in actions brought against the petitioners. *Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 449 (1952); *International Salt Co.* v. *United States,* 332 U. S. 392, 400, 401 (1947); *United States* v. *National Lead Co.,* 332 U. S. 319, 334-335 (1947); *Associated Press* v. *United States,* 326 U. S. 1, 22 (1945); *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185-187 (1944); *Chrysler Corp.* v. *United States,* 316 U. S. 556, 562 (1942).

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

ELMER FINCK,
SAMUEL I. ROSENMAN,
SEYMOUR D. LEWIS,
MALCOLM A. HOFFMANN,
SEYMOUR KRIEGER.

Attorneys for National Gypsum Company

November, 1955.